No. 89-1283

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ARCADIA, OHIO, *et al.*,
Petitioners,

v.

OHIO POWER COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE INDIANA MUNICIPAL POWER AGENCY AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

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QUESTIONS PRESENTED

1. Whether the lower court erroneously failed to accord any deference to agency interpretation of a statutory scheme, where

   (a) the scheme consists of two statutes (the Federal Power Act or FPA and the Public Utility Holding Company Act or PUHCA), administered by two agencies (the Federal Energy Regulatory Commission or FERC and the Securities and Exchange Commission or SEC, respectively), which function together to regulate interstate public utility holding companies; and

   (b) the lower court's ruling as to the jurisdiction of each agency is inconsistent with the manner in which both agencies have interpreted and administered the relevant statutory provisions since the FPA and PUHCA were enacted more than half a century ago.

2. Whether the lower court erroneously interpreted FPA Section 318 and PUHCA Section 13(b), through misapplication of preemption principles and this Court's decision in *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986), in holding that the FERC is without jurisdiction to ensure that a public utility holding company's rates include only just and reasonable payments made to affiliated suppliers of fuel and other goods and services used to produce electricity, even when the SEC has not scrutinized or determined the affiliated supplier prices.

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BRIEF OF THE INDIANA MUNICIPAL POWER AGENCY AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

The Indiana Municipal Power Agency (IMPA), pursuant to Rule 37 of the Rules of the Supreme Court of the United States, hereby submits this brief as *amicus curiae*, in support of the "Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit," filed on February 9, 1990, by Arcadia, Ohio, *et al.* (the Petition for Certiorari).[1]

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[1] Letters of consent from the parties below are being filed with the Court simultaneously with the filing of this *amicus* brief.

PARTIES TO THE PROCEEDINGS

The parties to the proceeding are set forth in the Petition for Certiorari.

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals are reproduced at pages 1a-28a of the Appendices to the Petition for Certiorari (Pet. App.), and reported at 880 F.2d 1400 (D.C. Cir. 1989). The decision of the Federal Energy Regulatory Commission (FERC) is reported at 39 F.E.R.C. ¶ 61,098 (1987) (Pet. App. pp. 31a-67a), and the FERC's decision denying rehearing is reported at 42 F.E.R.C. ¶ 61,046 (1988) (Pet. App., pp. 68a-73a).

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

AUTHORITIES INVOLVED

Section 318 of the Federal Power Act or FPA, 16 U.S.C. § 825q, is set out in the Petition for Certiorari (page 2). Other statutory provisions at issue are FPA Sections 205 and 206, 16 U.S.C. §§ 824d and 824e, and Section 13(b) of the Public Utility Holding Company Act or PUHCA, 15 U.S.C. § 79m(b). These provisions are reproduced in the Statutory Appendix to this brief.

INTEREST OF THE INDIANA MUNICIPAL POWER AGENCY

IMPA was formed as a political subdivision of the State of Indiana, pursuant to Indiana Code 8-1-2.2, to serve as an electric power supply and planning agency for municipalities which own and operate retail electric distribution systems. IMPA currently consists of 29 Indiana cities and towns.[2] IMPA is a wholesale electric

[2] The members of IMPA are the cities and towns of Anderson, Bainbridge, Bargersville, Centerville, Columbia City, Covington, Crawfordsville, Darlington, Edinburgh, Flora, Frankfort, Frankton, Greendale, Greenfield, Jamestown, Lawrenceburg, Lebanon, Linton, Middletown, Paoli, Pendleton, Peru, Renssalaer, Richmond, Rising Sun, Scottsburg, Tipton, Washington and Waynetown, Indiana.

customer of Indiana Michigan Power Company (I&M), which is an operating company subsidiary of the American Electric Power Company, Inc. (AEP). AEP is a registered public utility holding company subject to the jurisdiction of the Securities and Exchange Commission (SEC). I&M's wholesale rates to IMPA are subject to the jurisdiction of the FERC.

The opinion below addressed the respective jurisdictions of the FERC and the SEC with regard to the regulation of the cost of fuel purchased by another operating company subsidiary of the AEP system, Ohio Power Company (Ohio Power), from its fuel subsidiary. The panel majority concluded that Section 318 of the FPA deprives the FERC of jurisdiction to apply a market-price test to payments made by Ohio Power to its fuel subsidiary in determining the justness and reasonableness of Ohio Power's electric rates, through which Ohio Power sought to pass the cost of those payments to its wholesale electric customers.

Inter-affiliate transactions can be a significant component of the costs of a public utility holding company. For example, AEP, through its operating companies, has invested not only in affiliate coal mining operations, but in related fuel supply equipment and facilities, including a fleet of river towboats, approximately 500 coal barges, more than 3000 rail-hopper cars for transporting coal, and a rail-to-barge coal transfer terminal on the Ohio River with the capacity of transferring in excess of 12 million tons of coal annually. As a customer of an operating company subsidiary of a registered public utility holding company, IMPA has a direct interest in preventing the imposition of unwarranted restrictions upon the exercise by the FERC of its jurisdiction to regulate

the wholesale electric rates of such operating company subsidiaries for the protection of consumers.

STATEMENT OF THE CASE

IMPA adopts the statement in the Petition for Certiorari.

REASONS FOR GRANTING THE PETITION

I. Summary

In the opinion below, the majority vacated a decision of the FERC, reached after a full adjudicative hearing and on the basis of an extensive record, disallowing in Ohio Power's wholesale rates a portion of the payments made to its affiliated coal supplier, because the price of that coal substantially exceeded the market price available from non-affiliated suppliers. The FERC concluded that this disallowance was necessary to ensure that Ohio Power's rates were just and reasonable, pursuant to Sections 205 and 206 of the FPA, 16 U.S.C. §§ 824d and 824e, relying on its previous determination [3] that a market-price test promotes economic efficiency and protects against the possibility of self-dealing among affiliates.

Pursuant to its authority under PUHCA, the Securities and Exchange Commission (SEC) had previously issued several orders regarding Ohio Power's coal affiliate. The FERC examined those orders and concluded that they were not inconsistent with disallowance of higher-than-market costs in Ohio Power's rates. 39 F.E.R.C. at pp. 61,276-78 (Pet. App., pp. 36a-40a). Judge Mikva, in his dissenting opinion, agreed. 880 F.2d at 1411-12 (Pet. App., pp. 21a-23a). *See also* the majority opinion, 880 F.2d at 1404, 1408-09 (Pet. App., pp. 5a-6a, 15a). The majority, however, held that FPA Section 318 di-

[3] *Public Service Co. of New Mexico*, 17 F.E.R.C. 61,123 (1981), *aff'd*, 823 F.2d 1201 (10th Cir. 1987).

vested the FERC of jurisdiction over this "subject matter" even if there was no conflict between the SEC and FERC orders. Because PUHCA Section 13(b) authorizes the SEC to regulate certain aspects of inter-affiliate holding company transactions in goods and services, the court concluded that Congress intended that the SEC have sole jurisdiction of prices paid by public utilities *and their ratepayers* for fuel and other goods and services supplied by affiliates,[4] when the utilities are members of registered public utility holding companies subject to PUHCA (unless the SEC has exempted the transaction in question from the requirements of Section 13(b)). The majority's reasoning apparently was that FPA Section 318 divests the FERC of jurisdiction to disallow or adjust for ratemaking purposes costs incurred pursuant to a transaction over which PUHCA gives the SEC some regulatory authority.

IMPA respectfully submits that the majority's holding requires this Court's review for two reasons. First, the lower court disregarded not only the FERC's interpretation of FPA Section 318, but also the *SEC's* interpretation of that provision and of PUHCA Section 13(b). Second, the lower court's ruling is not only clearly erroneous, but also distorts the law established by this Court in *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986), and does substantial violence to the regulatory system that Congress established and two agencies have implemented over half a century, to protect investors and consumers from abuses of interstate public utility holding companies.

II. The Decision Below Upsets 50 Years of SEC and FERC/FPC Decisionmaking

The lower court concluded that it should not defer to the FERC's interpretation of FPA Section 318 because

[4] Other than electricity, which is exempted from SEC regulation by PUHCA Section 2(a)(20), 15 U.S.C. § 79b(a)(20).

what was at issue was that agency's jurisdiction. 880 F.2d at 1405 (Pet. App., p. 8a). However, the lower court's action was more serious than this characterization might suggest. The court disregarded the interpretation of FPA Section 318 and PUHCA Section 13(b) that has consistently been employed by *both* agencies entrusted by Congress with administering the statutes it enacted simultaneously in 1935: the FERC (and its predecessor, the Federal Power Commission or FPC) *and* the SEC. In so doing, the lower court disrupted a regulatory system that those agencies have developed over the last half century.

The FERC's view that its mandate to ensure just and reasonable rates includes the power and the obligation to scrutinize holding company inter-affiliate payments is not of recent vintage. Prior to the development of the market-price test that was applied to Ohio Power, the FERC's predecessor, the FPC, disallowed for ratemaking purposes excessive payments made by public utilities to supplier affiliates. The FPC's "no profits to affiliates" rule was applied to operating utilities within holding company systems, even though their transactions with affiliated service companies and fuel suppliers were regulated by the SEC under PUHCA. *E.g., California Oregon Power Co. v. FPC*, 150 F.2d 25, 27-28 (9th Cir. 1945), *cert. denied*, 326 U.S. 781 (1946).[5]

The conclusion of the majority below that SEC pronouncements are consistent with ousting the FERC of jurisdiction over holding company affiliate fuel purchases is incorrect. In numerous orders, stretching from the 1940's through the 1980's, the SEC has acknowledged

[5] The FPC originally developed the "no profits to affiliates" rule in the early 1930's, in regulating hydroelectric licensees under the Federal Water Power Act of 1920 (now Part I of the FPA). After the enactment of the FPA and PUHCA in 1935, the FPC applied this rule to the regulation of interstate electric utilities. *California Oregon Power Co. v. FPC*, 150 F.2d at 27.

FPC/FERC jurisdiction to scrutinize costs incurred by public utilities pursuant to intra-holding company transactions subject to SEC jurisdiction under PUHCA, at least in the absence of a conflict between the FPC's or FERC's actions and a specific SEC ruling pertaining to the cost in question.

In *Central and South West Fuels, Inc.*, Holding Company Act Release No. 23,876, 34 SEC Docket 500 (October 23, 1985), the SEC considered a proposal by electric utility subsidiaries of the Central and South West Corporation to dissolve a fuel subsidiary and transfer its functions to the service company for the holding company system. In response to a concern expressed by intervenors that inflated fuel prices might result, the SEC expressly acknowledged the FERC's continuing jurisdiction:

> [N]othing in the proposed transactions will alter the statutory and regulatory pricing restrictions applicable to the sale of fuel to, or the performance of services for, affiliated operating companies. Such restrictions will continue to apply . . . as fully as they have applied . . . in the past. For example, Rules 90 and 91 [promulgated under PUHCA] limit charges for sale or services by an affiliated company to cost; Paragraph E of Section 23.23 of the Substantive Rules of the Public Utility Commission of Texas expressly limits affiliate fuel pricing to cost; and similarly, with respect to wholesale rates, under Section 35.14 of the regulations of FERC, unreasonable fuel charges by affiliated companies may result in the suspension of the fuel adjustment clause or cause an investigation by FERC on its own motion.

34 SEC Docket at 503. In approving requests in the 1940's by Ohio Power and an affiliated public utility to establish a coal subsidiary, the SEC noted that its actions did not preclude ratemaking authorities from scrutinizing the transactions in question for purposes of setting rates.

Appalachian Electric Power Co., 27 S.E.C. 1029, 1034-35 (1948).[6] *Accord, The North American Co.*, 29 S.E.C. 521, 537 n.26 (1949) (in ruling that a holding company could retain its coal subsidiary, SEC noted that coal prices would be scrutinized by ratemaking authorities, and added that it could take action under Section 13 and other provisions of PUHCA at a later date if necessary). *See also New England Power Service Co.*, 10 S.E.C. 562, 571 (1941) (in investigating the relationship between the service company and two operating utility subsidiaries of a registered holding company, the SEC examined the holding company members' rates to test the system's efficiency, but observed that "the propriety of the rate itself [is] a matter over which this Commission has no jurisdiction . . .").

In the proceeding below, the FERC relied on SEC statements in *New England Electric System*, Holding Company Act Release No. 22,309, 24 SEC Docket 298 (December 9, 1981). The lower court distinguished this case on the grounds that the SEC's discussion of the FERC's authority may have been predicated on the grant of an exemption under PUHCA Section 13(b). 880 F.2d at 1407 (Pet. App., pp. 12a-13a). This reading is incorrect. The SEC concluded that, because FERC's ratemaking jurisdiction is *independent* of PUHCA, no harm to consumers would result from a grant of exemption from PUHCA Section 13(b). 24 SEC Docket at 307-08, quoted at 39 F.E.R.C. at pp. 61,277-78 (Pet. App., pp. 39a-40a).

In other decisions, the SEC has observed that its jurisdiction over financing vehicles under PUHCA does not operate in conjunction with FPA Section 318 to divest the FERC or state ratemaking agencies of their authority to disallow the related costs in setting just and rea-

[6] The SEC added that it had the authority, under PUHCA Section 13, to take further action in the future if it determined that such action was necessary to enforce the standards of PUHCA or to protect consumers or investors. 27 S.E.C. at 1035.

sonable electric rates. *E.g., Arkansas Power & Light Co.*, Holding Company Act Release No. 18,442, 4 SEC Docket 395, 397 (June 4, 1974) (SEC approval of a sale and leaseback of nuclear fuel does not bind retail rate agencies or the FPC to allow the cost of the fuel in rates); *Georgia Power Co.*, Holding Company Act Release No. 18,750, 5 SEC Docket 24, 25 (December 31, 1974) (SEC approval of a partial sale of a nuclear plant by an operating utility subsidiary of the Southern Company does not prevent rate commissions from scrutinizing the reasonableness of the sale price under FPA Section 318). In considering how a refinancing of a holding company operating utility subsidiary should be treated in the ratemaking system of accounts, the FPC held that FPA Section 318 did not divest it of jurisdiction in the absence of SEC action. *Oklahoma Gas and Electric Co.*, 5 F.P.C. 52, 54 (1946). The SEC, expressing a desire to avoid conflicts with the FPC and state ratemaking authorities, approved the same accounting treatment approved by the FPC, although it was somewhat at odds with general SEC policy. *Oklahoma Gas and Electric Co.*, 22 S.E.C. 209, 219 (1946), and 22 S.E.C. 466 (1946).[7] Although these cases do not involve PUHCA Section 13(b), they are inconsistent with the lower court's reading of FPA Section 318, because they establish that the SEC has not interpreted its jurisdiction to be exclusive even over "subject matters" that are expressly enumerated in FPA Section 318 (accounting, se-

[7] Similarly, when the SEC has exercised its regulatory powers under PUHCA regarding corporate and financial holding company system restructurings, it has always assumed that the FERC/FPC has the authority to scrutinize those same transactions with regard to how they affect the reasonableness of wholesale rates and interstate electric utility operations. *E.g., Sierra Pacific Resources*, Holding Company Act Release No. 24,566, 40 SEC Docket 103, 109 (January 28, 1988), *aff'd, Environmental Action v. SEC*, No. 88-7132 (9th Cir. filed February 9, 1990); *Georgia Power Co.*, Holding Company Act Release No. 23,330, 30 SEC Docket 934, 935-36 (June 15, 1984).

curity issuances, and acquisition and disposition of securities, assets and facilities).

Judicial deference to an agency's interpretation of a statute that it administers is grounded in the principle that a reviewing court should not interfere with the authority delegated to the agency to develop the details of an administrative scheme and to develop policy within the parameters set by Congress. *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837, 843-44 (1984). Whatever the merits of judicial deference to an agency's interpretation of its statutory jurisdiction in an ordinary case, the lower court's action in the case at bar was extraordinary. The majority's ruling disrupts a regulatory system fashioned by two agencies over a 50-year period, in which the SEC, in exercising its powers under PUHCA, generally has deferred to and relied upon the FERC's or FPC's power, in setting rates, to disallow costs incurred by operating utility subsidiaries of holding companies as unjust and unreasonable. Moreover, the FERC's and SEC's longstanding implementation of FPA Section 318 and PUHCA Section 13(b) is entirely consistent with the plain meaning of those statutes.

III. The Decision Below Does Violence to the Statutory Scheme and Distorts This Court's Prior Holdings

The lower court rested its decision that the FERC was divested of jurisdiction to disallow payments made by Ohio Power to its coal subsidiary, even in the absence of any conflicting SEC order, on an extremely broad and unreasonable reading of FPA Section 318 and PUHCA Section 13(b). Analogizing to the doctrine of "preemption of the field," which has been applied to bar state regulation of a subject matter which Congress intended be subject only to federal regulation, the lower court concluded that Congress intended to divest a *federal* agency, charged with ensuring just and reasonable electric rates, of jurisdiction over an important aspect of rates (intra-holding company transactions in fuel and other goods and services used to produce electricity), simply by enacting PUHCA Section 13(b) and FPA Section 318. This conclusion is contradicted by the very fact that in 1935 Congress established a scheme to regulate interstate electric utilities that consisted of *two* statutes and *two* agencies, with interlocking and complementary powers.[8] FPA Section 318 was necessary to resolve any actual conflicts that might arise between the two agencies. There is no reasonable basis to read that provision, together with PUHCA Section 13(b), as a complete withdrawal of jurisdiction from the FERC of an important element of rates. Congress addressed the general scope of the FERC's jurisdiction over interstate utility rates and services in Section 201 of the FPA (18 U.S.C. § 824), not in Section 318. *See, e.g.*, Section 201(b)(1) (no jurisdiction over generating or distribution facilities or purely intrastate transmission facilities), and Section 201(f) (no jurisdiction over the United States, or a state, or any political subdivision of a state).

The notion that FPA Section 318 divests the FERC of jurisdiction of any "subject matter" regulated by the SEC under PUHCA cannot be squared with this Court's ruling in *Northwestern Electric Co. v. FPC*, 321 U.S. 119 (1944). In that case, the Court rejected a challenge to an FPC order requiring a holding company operating utility subsidiary to reclassify, in the ratemaking system

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[8] The D.C. Circuit has explained this scheme as one giving the SEC principal authority over utility corporate structure and financing, and the FERC (foremrly the FPC) principal authority over interstate utility operations and rates. *City of Lafayette v. SEC*, 454 F.2d 941, 954-56 (D.C. Cir. 1971), *aff'd on other grounds, Gulf States Utilities Co. v. FPC*, 411 U.S. 747 (1973). This Court quoted the *Lafayette v. SEC* analysis of the allocation of authority between the SEC and the FERC/FPC in *Gulf States Utilities Co. v. FPC*, 411 U.S. at 754-55 n.4.

of accounts, $3.5 million of capital stock to eliminate an over-valuation of the utility's assets. In response to an argument that the FPC's order was inconsistent with the SEC's authority and regulations, the Court concluded that "an examination of the statute and of the orders and proceedings of the [SEC] satisfies us that no conflict exists." 321 U.S. at 125. Although *Northwestern Electric* did not involve PUHCA Section 13(b), it did involve a "subject matter" specifically identified in FPA Section 318—"the method of keeping accounts"—which is subject to SEC regulation under PUHCA and FERC/FPC regulation under the FPA. *See Appalachian Power Co. v. FPC*, 328 F.2d 237 (4th Cir.), *cert. denied*, 379 U.S. 829 (1964).

As pointed out by the dissent (Pet. App., p. 30a), the decision below creates a serious regulatory gap in the system designed by Congress and implemented by the FERC and the SEC. The majority observed that Ohio Power's coal costs had not been scrutinized or controlled by the SEC. 880 F.2d at 1408-09 (Pet. App., p. 15a). However, the gap is more serious than the lower court acknowledged. The SEC's orders regarding Ohio Power are no anomaly. As discussed above, the SEC has frequently declined to closely scrutinize inter-affiliate costs, because it has assumed that they would be scrutinized by the FERC (and state commissions) in the context of rate proceedings. Even more important, as the Petitioners noted, the SEC lacks the statutory and administrative procedures to hear complaints regarding excessive rates, and also appears to lack the authority to provide retroactive relief from excessive charges (Petition for Certiorari, p. 19). In rejecting a "preemption of the field" analysis regarding regulation of rural electric cooperatives by state authorities, when the FERC had declined to regulate those entities, this Court observed that "Congress' purpose in 1935 [in enacting the FPA provisions regarding regulation of interstate electric utilities] was to fill a regulatory gap, not to perpetuate one." *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Comm'n*, 461 U.S. 375, 384 (1983) (footnote omitted). By divesting the *federal* agency entrusted with interstate electric rate regulation of jurisdiction over an important element of the rates of those utilities who belong to interstate holding company systems, the lower court created an outcome even more unreasonable than that rejected by the Court in *Arkansas Electric Cooperative Corp.*

The regulatory gap threatened by the decision below is much wider than the specific holding. Although the court only purported to consider the wholesale ratemaking jurisdiction of the FERC, its analysis would appear to divest state commissions of jurisdiction over this aspect of retail rates. The majority relied on a "preemption of the field"-type analysis of PUHCA Section 13(b) in its interpretation of FPA Section 318. In so doing, the court claimed to be relying on the principles articulated in *Nantahala Power & Light Co. v. Thornburg*, and, in particular, on this Court's analysis of the problem of "trapped costs." However, state commissions are not preempted by *Nantahala v. Thornburg* from disallowing in retail rates the costs of an electric utility or natural gas pipeline other than costs incurred pursuant to a FERC-regulated rate paid to a supplier of wholesale electricity or natural gas. The costs which *Nantahala* ruled should not be "trapped" by a state comission in retail rates are wholesale electricity or gas costs borne by a utility pursuant to an interstate transaction approved as just and reasonable by the FERC. 476 U.S. at 969-970, 971-72. *Accord, Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 108 S.Ct. 2428, 2438-39 (1988). Thus, the decision below incorrectly applies this Court's ruling in *Nantahala*, to the detri-

ment of many millions of consumers served by holding company systems.[9]

With regard to FERC as well as state regulation of rates, the lower court's reliance on the *Nantahala* "trapped costs" principle is misplaced. Ohio Power did not experience any "trapped costs", in the sense of costs mandated by the SEC under PUHCA and disallowed by the FERC under the FPA. The FERC and the dissenting judge below reviewed the SEC orders touching on Ohio Power's purchases from its coal subsidiary, and concluded that there was no conflict with the action taken by the FERC (Pet. App., pp. 21a-23a, 36a-37a, 61a-62a). The majority disregarded this analysis, because it concluded that Ohio Power should be protected against even the possibility of trapped costs. This conclusion, however, is inconsistent with Congress' decision to delegate to *two* agencies the task of regulating interstate public utility holding companies to protect investors and consumers from the abuses which were paramount in the minds of the drafters of the Federal Power and Public Utility Holding Company Acts of 1935.

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[9] In the decisions cited in the previous section, the SEC has repeatedly declared that state retail rate commissions as well as the FERC are free to scrutinize inter-affiliate costs of holding company systems to protect ratepayers from excessive charges. *E.g., Central and South West Fuels, Inc.*, 34 SEC Docket at 503; *Georgia Power Co.*, 5 SEC Docket at 24; *Arkansas Power & Light Co.*, 4 SEC Docket at 397; *Appalachian Electric Power Co.*, 27 S.E.C. at 1034-35.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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STATUTORY APPENDIX

STATUTORY APPENDIX

SECTION 318 OF THE FEDERAL POWER ACT, 16 U.S.C. § 825q

Conflict of jurisdiction

If, with respect to the issue, sale, or guaranty of a security, or assumption of obligation or liability in respect of a security, the method of keeping accounts, the filing of reports, or the acquisition or disposition of any security, capital assets, facilities, or any other subject matter, any person is subject both to a requirement of the Public Utility Holding Company Act of 1935 [15 U.S.C.A. § 79 et seq.] or of a rule, regulation, or order thereunder and to a requirement of this chapter or of a rule, regulation, or order thereunder, the requirement of the Public Utility Holding Company Act of 1935 shall apply to such person, and such person shall not be subject to the requirement of this chapter, or of any rule, regulation, or order thereunder, with respect to the same subject matter, unless the Securities and Exchange Commission has exempted such person from such requirement of the Public Utility Holding Company Act of 1935, in which case the requirements of this chapter shall apply to such person.

SECTION 13(b) OF THE PUBLIC UTILITY HOLDING COMPANY ACT, 15 U.S.C. § 79m(b)

Contracts by subsidiary or mutual service companies

(b) After April 1, 1936, it shall be unlawful for any subsidiary company of any registered holding company or for any mutual service company, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, to enter into or take any step in the performance of any service, sales, or construction contract by which such company undertakes to perform services

or construction work for, or sell goods to, any associate company thereof except in accordance with such terms and conditions and subject to such limitations and prohibitions as the Commission by rules and regulations or order shall prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers and to insure that such contracts are performed economically and efficiently for the benefit of such associate companies at cost, fairly and equitably allocated among such companies. This provision shall not apply to such transactions as the Commission by rules and regulations or order may conditionally or unconditionally exempt as being necessary or appropriate in the public interest or for the protection of investors or consumers, if such transactions (1) are with any associate company which does not derive, directly or indirectly, any material part of its income from sources within the United States and which is not a public-utility company operating within the United States, or (2) involve special or unusual circumstances or are not in the ordinary course of business.

SECTION 205 OF THE FEDERAL POWER ACT, 16 U.S.C. § 824d

Rates and charges; schedules; suspension of new rates; automatic adjustment clauses

(a) Just and reasonable rates

All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) Preference or advantage unlawful

No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Schedules

Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, or classifications, and services.

(d) Notice required for rate changes

Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time

when they shall take effect and the manner in which they shall be filed and published.

(e) Suspension of new rates; hearings; five month period

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, tc the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

(f) Review of automatic adjustment clauses and public utility practices; action by Commission; definition

(1) Not later than 2 years after November 9, 1978 and not less often than every 4 years thereafter, the Commission shall make a thorough review of automatic adjustment clauses in public rate schedules to examine—

(A) whether or not each such clause effectively provides incentives for efficient use of resources (including economical purchase and use of fuel and electric energy), and

(B) whether any such clause reflects any costs other than costs which are—

(i) subject to periodic fluctuations and

(ii) not susceptible to precise determinations in rate cases prior to the time such costs are incurred.

Such review may take place in individual rate proceedings or in generic or other separate proceedings applicable to one or more utilities.

(2) Not less frequently than every 2 years, in rate proceedings or in generic or other separate proceedings, the Commission shall review, with respect to each public utility, practices under any automatic adjustment clauses of such utility to insure efficient use of resources (including economical purchase and use of fuel and electric energy) under such clauses.

(3) The Commission may, on its own motion or upon complaint, after an opportunity for an evidentiary hearing, order a public utility to—

(A) modify the terms and provisions of any automatic adjustment clause, or

(B) cease any practice in connection with the clause,

if such clause or practice does not result in the economical purchase and use of fuel, electric energy, or other items, the cost of which is included in any rate schedule under an automatic adjustment clause.

(4) As used in this subsection, the term "automatic adjustment clause" means a provision of a rate schedule which provides for increases or decreases (or both), without prior hearing, in rates reflecting increases or decreases (or both) in costs incurred by an electric utility. Such term does not include any rate which takes effect subject to refund and subject to a later determination of the appropriate amount of such rate.

SECTION 206 OF THE FEDERAL POWER ACT, 16 U.S.C. § 824e

Power of Commission to fix rates and charges; determination of cost of production or transmission

(a) Unjust or preferential rates, etc.; statement of reasons for changes; hearing; specification of issues

Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the

Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

(b) Refund effective date; preferential proceedings; statement of reasons for delay; burden of proof; scope of refund order; refund orders in cases of dilatory behavior; interest

Whenever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date 60 days after the filing of such complaint nor later than 5 months after the expiration of such 60-day period. In the case of a proceeding instituted by the Commission on its own motion, the refund effective date shall not be earlier than the date 60 days after the publication by the Commission of notice of its intention to initiate such proceeding nor later than 5 months after the expiration of such 60-day period. Upon institution of a proceeding under this section, the Commission shall give to the decision of such proceeding the same preference as provided under section 824d of this title and otherwise act as speedily as possible. If no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, whichever is earlier, the Commission shall state the reasons why it has

failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. In any proceeding under this section, the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon the Commission or the complainant. At the conclusion of any proceeding under this section, the Commission may order the public utility to make refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Commission orders to be thereafter observed and in force: *Provided*, That if the proceeding is not concluded within fifteen months after the refund effective date and if the Commission determines at the conclusion of the proceeding that the proceeding was not resolved within the fifteen-month period primarily because of dilatory behavior by the public utility, the Commission may order refunds of any or all amounts paid for the period subsequent to the refund effective date and prior to the conclusion of the proceeding. The refunds shall be made, with interest, to those persons who have paid those rates or charges which are the subject of the proceeding.

(c) Refund considerations; shifting costs; reduction in revenues; "electric utility companies" and "registered holding company" defined

Notwithstanding subsection (b) of this section, in a proceeding commenced under this section involving two or more electric utility companies of a registered holding company, refunds which might otherwise be payable under subsection (b) of this section shall not be ordered to the extent that such refunds would result from any portion of a Commission order that (1) requires a decrease in system production or transmission costs to be

paid by one or more of such electric companies; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company: *Provided*, That refunds, in whole or in part, may be ordered by the Commission if it determines that the registered holding company would not experience any reduction in revenues which results from an inability of an electric utility company of the holding company to recover such increase in costs for the period between the refund effective date and the effective date of the Commission's order. For purposes of this subsection, the terms "electric utility companies" and "registered holding company" shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended [15 U.S.C.A. § 79 et seq.].

(d) Investigation of costs

The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.